STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2010
v	No. 290383 Wayne Circuit Court
NATHANIEL ANDRE BERNOUDY, Defendant-Appellant.	LC No. 08-012434-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced as a second habitual offender, MCL 769.10, to 37 years, 6 months to 60 years, for second-degree murder, seven to ten years for assault with intent to do great bodily harm, three to five years for felon in possession of a firearm, and two years for his felony-firearm convictions. We affirm.

I. BACKGROUND

This case arises out of the gang-related slaying of Alan Deans on the night of July 26, 2008, in Detroit. On that night, Deans, age 17, attended a party at 18690 Forrer Street with friends, Paris Jordan, Christopher Walker, and Markell Harris. Approximately 100 to 150 people were in attendance. Around 11:30 p.m., a "rowdy" group of eight young men, including defendant, arrived at the party yelling their gang name, "8 Mile Sconies." Shortly thereafter, either defendant or one of the gang members next to whom defendant was standing bumped into Deans who was standing in the driveway near the side of the house. A confrontation ensued, and as Deans was preparing for a fight, several shots rang out wounding Jordan, but fatally wounding Deans. The autopsy report revealed that Deans was shot in the chest and back.

[1] Defendant's second-degree murder and assault with intent to do great bodily harm convictions are the lesser-included offenses of the original charges of first-degree premeditated murder, MCL 750.316, and assault with intent to murder, MCL 750.83.

Regarding the identity of the shooter, only Walker and Jordan offered testimony directly implicating defendant. Walker, who was standing six feet from defendant during the shooting, identified defendant as the shooter in a lineup following the shooting and unequivocally identified defendant as the shooter at the preliminary examination.[2] Jordan, however, indicated that although he did not see the shooter's face, he recalled a tattoo of the letter "N" on the right side of the shooter's neck. At trial, Jordan identified the tattoo of "MLN" on the right side of defendant's neck as the tattoo of the shooter. Jordan also identified defendant as the shooter in a photographic lineup shortly after the shooting, although the tattoo was not visible in that picture. Other witnesses offered inconsistent testimony regarding the shooter's clothes and hairstyle. The jury subsequently convicted defendant of the aforementioned offenses and after sentencing, the instant appeal ensued.

II. ANALYSIS

A. CONFRONTATION CLAUSE

As his first assignment of error, defendant asserts that the admission of Walker's testimony describing and identifying defendant the night of the shooting violated his right of confrontation. Defendant concedes this argument is unpreserved. Therefore, our review is for plain error affecting substantial rights, i.e., outcome determinative error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the "right . . . to be confronted with the witnesses against him," US Const, Am VI, and excludes the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination[,]" *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Prior testimony at a preliminary examination constitutes a testimonial statement. *Id*. at 68. Therefore, because admissibility under MRE 804(b)(1) (governing admissibility of former testimony of an unavailable witness) requires that a defendant have "an opportunity and similar motive to develop the [former] testimony by direct, cross, or redirect examination," the prior recorded testimony of an unavailable witness made at a preliminary examination does not violate a defendant's constitutional rights provided it is properly admitted under that rule. See *People v Meredith*, 459 Mich 62, 70-71; 586 NW2d 538 (1998).

At trial, the court permitted Walker's testimony taken during defendant's preliminary examination to be read into the record.[3] In challenging the admissibility of this evidence, defendant claims that (1) Walker's description of defendant to police that Walker recounted at the preliminary examination was not prior recorded testimony and (2) defendant lacked a similar motive to develop Walker's testimony at the preliminary examination.

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[2] Because Walker had been shot and killed in an unrelated incident prior to trial, the court permitted his preliminary examination testimony to be read into the record.

[3] Death of a witness constitutes unavailability under MRE 804(a)(4).

Regarding whether the description was prior recorded testimony, defendant correctly observes that Walker admitted providing a description of defendant to police while noting that he did not recall the details of that description. However, admission of this portion of Walker's testimony did not violate MRE 804(b)(1) where Walker did not in fact recount the description he provided to police. Moreover, we note that other than his conclusive argument on this issue, defendant fails to elaborate or cite any authority showing how the fact that those details were "never testified to nor made a part of the record" violated MRE 804(b)(1) under these circumstances. It is not our responsibility to unravel defendant's arguments and search for supporting authority. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Regardless, any error did not violate defendant's substantial rights where the police officer to whom Walker made the description recounted Walker's description at trial *without objection from defendant*. *People v Pipes*, 475 Mich 267, 279 n 44; 715 NW2d 290 (2006). And what is more, defendant does not challenge on appeal the admissibility of that description as offered by the police officer.

With respect to motive, defendant maintains that he lacked a similar motive to develop Walker's identification testimony because the testimony was taken at a preliminary examination where the standard of proof required to bind over a defendant, i.e., probable cause, differs from the standard of proof required to convict a defendant, i.e., proof beyond a reasonable doubt. See *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997). Other than noting this difference, however, defendant does not explain *how* the different standards of proof affected his motive in cross examining Walker. *Kevorkian*, 248 Mich App at 389.

Notwithstanding, relevant to our determination of whether a defendant had a similar motive to examine a witness at the prior proceeding are the following factors:

> (1) whether the party opposing the testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue; (2) the nature of the two proceedings–both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities). [*People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007) (quotation marks and citation omitted).]

After careful examination of these factors in conjunction with the record, we conclude defendant had a sufficiently similar motive to cross examine Walker at the preliminary examination. Indeed, at stake at the preliminary examination was whether defendant would face a myriad of charges at trial including first-degree murder. Avoiding such charges would be of paramount importance to any individual – regardless of the burden of proof. And testimony of a witness positively identifying defendant as the shooter would be among the most important pieces of evidence to attack. On this point, the record reveals that defense counsel adequately questioned Walker on aspects of his identification that could weaken his credibility, including the lighting during the shooting, his proximity to the shooter, and the direction he was facing as the shots were fired. Any argument as to motive is of no service to defendant on this issue.

In any event, even if there were error, we cannot find that the admission of Walker's testimony describing and identifying defendant was outcome determinative where – in spite of conflicting testimony regarding the shooter's appearance – Jordan testified that the tattoo on the

right side of the shooter's neck was identical to the tattoo on the right side of defendant's neck, and where Jordan identified defendant as the shooter in photographic lineup after the shooting.

We also reject defendant's argument that counsel's failure to object to the admission of Walker's testimony at either the preliminary examination or at trial amounted to ineffective assistance of counsel.[4] Indeed, counsel is not required to make a meritless motion or fruitless objection, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998), and given our analysis concerning the propriety of admitting Walker's testimony, any motion or objection would have been meritless or fruitless. Additionally, defendant cannot sustain an argument for ineffective assistance of counsel where outcome determinative error was nonexistent. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999). Defendant's claim on this score is meritless.

2. SENTENCING

Defendant next argues that the court erroneously scored Offense Variable (OV) 5 at 15 points.[5] This Court reviews the application of the sentencing guidelines de novo but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). A trial court's sentence may be invalid if it is based on a misconception of the law or inaccurate information. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). However, absent an error in the scoring or reliance on inaccurate information in determining the sentence, this Court must affirm a sentence within the applicable guidelines range. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

A score of 15 points for OV 5 (psychological injury to a member of a victim's family) is appropriate where there is serious psychological injury to a member of the victim's family that may require professional treatment. MCL 777.35(1). Notably, whether the family member has sought treatment is not conclusive to this determination. MCL 777.35(2).

The record evidence supported a score of 15 points. Specifically, Deans's mother indicated in her victim impact statement that she was "greatly affected and devastated by what

[4] To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999).

[5] This issue is properly appealable as defendant raised this issue in his motion to remand for resentencing, which this Court denied, *People v Bernoudy*, unpublished order of the Court of Appeals, entered September 3, 2009 (Docket No. 290383). 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

happened to her son" and emphasized at sentencing that while she forgave defendant, she would have to live with her son's death for the rest of her life and repeatedly uttered, "I just don't understand." Deans's father also attempted to extend forgiveness to defendant during sentencing, but his allocution was truncated by the trial court after he exclaimed, "I really want to [expletive] your [expletive] up, but I can't do it." Certainly such comments by parents, especially the father's outburst and threat during a formal court proceeding that required the court's intervention, are indicative of serious psychological injury that may require professional treatment. As we must uphold a scoring decision for which there is any support in the record, *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996), we can find no abuse of discretion in scoring this variable.[6]

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering

[6] In light of our conclusion that OV 5 was properly scored, we decline to address defendant's claim that resentencing is required where scoring OV 5 at zero points would have reduced the guidelines minimum sentencing range, thus rendering his minimum sentence for his assault with intent to commit great bodily harm conviction an upward departure.